

**A RESOLUTION BY
PUBLIC SAFETY AND LEGAL ADMINISTRATION COMMITTEE**

A RESOLUTION AUTHORIZING THE MAYOR TO EXECUTE A SETTLEMENT AGREEMENT WITH ARCHER-WESTERN CONTRACTORS LTD./CAPITAL CITY CONTRACTING CO., INC., A JOINT VENTURE, FOR CONTRACT NO. FC-5264-92; HEMPHILL PUMP STATION AND CLEARWELL IMPROVEMENTS, OUTLINING EACH PARTY'S RIGHTS TO ANY FUNDS RECOVERED FROM THE BUILDER'S RISK INSURER, DESIGNERS AND CONSTRUCTION MANAGERS FOR THE PROJECT IN SETTLEMENT OF VARIOUS CLAIMS EXISTING CONCERNING THE CONTRACT AND THE DESIGN AND CONSTRUCTION OF THE PROJECT; AND FOR OTHER PURPOSES.

02-*ℓ* -0882

BACKGROUND

WHEREAS, on September 26, 1994, the City entered into Contract No. FC-5264-92 (the "Contract"); Hemphill Pump Station and Clearwell Improvements (the "Project"), with Archer-Western Contractors LTD./Capital City Contracting Co., Inc., a joint venture (the "Contractor"); and

WHEREAS, the Scope of Work under the Contract included the construction of improvements to the City's Hemphill Water Treatment Plant, including a new clearwell with a storage capacity of 15 million gallons, transfer piping, butterfly valves and a new high service pump station; and

WHEREAS, during the construction of the Project, it was determined that the existing butterfly valves on the finished water main, which discharges into the new high service pump station, were inoperable; and

WHEREAS, subsequently, a dispute arose between the City, the Contractor, the design engineers for the Project, Jordan, Jones and Goulding, Inc./Delon Hampton and Associates, Chartered-JV, Williams-Russell and Johnson, Inc., and the construction managers for the Project, Mayes, Sudderth & Etheredge, Inc./Harrington, George & Dunn, P.C. and Construction Dynamics Group, as to the inoperability of the butterfly valves; and

WHEREAS, based upon an evaluation of the Water Treatment Plant and the various remediation alternatives available to the City, it was determined by the City, and its design consultant, Hartman & Associates, Inc, to replace the existing butterfly valves that failed with new valves, construct valve vaults, weld stiffener rings to the steel pipe used in the system and install the necessary appurtenances; and

WHEREAS, the City and the Contractor agreed to a remediation plan for the Project, based upon Hartman's remediation design proposal, and the Contractor agreed to construct the remediation and participate in the resolution of existing issues concerning the Project; and

WHEREAS, accordingly, the City and the Contractor entered into Change Order No. 3 to the Contract, which provided for the Contractor's construction of the remediation for the Project and contribution of \$3.2 million of its own funds towards the cost of the remediation; the City contributed towards the cost of the remediation the remaining funds; and

WHEREAS, the total cost of the remediation has been approximately \$___ million, which the City and Contractor have sought to recover from the designers, construction managers and builder's risk insurer for the Project; and

WHEREAS, accordingly, the City and the Contractor asserted certain claims against the designers and construction managers for the Project, as well as the builder's risk insurer that provided a policy for the Project, concerning the inoperable butterfly valves and the need for the remediation; and

WHEREAS, in connection with the claims asserted against the designers, construction managers and builder's risk insurer, Change Order No. 3 contained provisions by which the City and Contractor agreed to share in the cost of the remediation, subject to an anticipated joint right of recovery against the designers, construction managers and builder's risk insurer; and

WHEREAS, to that end, Change Order No. Three (3) included among its terms, paragraph 4.5, entitled "Liquidation Agreement", by which the parties agreed to consider entering into an agreement concerning the apportionment of any joint recovery obtained against, or settlement entered into with, the designers, construction managers and builder's risk insurer, or any one or combination of them, concerning the Project; and

WHEREAS, the City reached a tentative settlement with the designers and construction managers for the Project, which settlement has been approved pursuant to Resolution No. ____, adopted by the City's Council on ____, 200_, and approved by the City's Mayor on ____, 200_, and provided for the total recovery from those parties by the City of \$2,750,000; and

WHEREAS, the City and Contractor have also reached an agreement between them concerning the apportionment of any recovery of monies from the designers, construction managers and builder's risk insurer; and

WHEREAS, the Contractor continues to negotiate a settlement with the builder's risk insurer and it is anticipated that the settlement with the builder's risk insurer will be in the range of \$1.2 million; and

WHEREAS, the settlement agreement between the City and Contractor contemplates that the City will retain all monies recovered from the designers and construction managers, the Contractor will retain monies recovered from the builder's risk insurer up to \$1.2 million and the

City and the Contractor will share on a 50/50 basis any monies recovered from the builder's risk insurer in excess of \$1.2 million; and

WHEREAS, the City and Contractor desire to reduce the terms of their apportionment settlement agreement to writing;

NOW, THEREFORE, BE IT RESOLVED BY THE COUNCIL OF THE CITY OF ATLANTA, that the Mayor is authorized to execute, on behalf of the City, a Settlement Agreement with the Contractor providing that the City will retain all monies recovered from the designers and construction managers, the Contractor will retain monies recovered from the builder's risk insurer up to \$1.2 million and the City and the Contractor will share on a 50/50 basis any monies recovered from the builder's risk insurer in excess of \$1.2 million.

BE IT FURTHER RESOLVED that the City Attorney is directed to prepare and finalize the Settlement Agreement with the Contractor for execution by the Mayor, to be approved as to form by the City Attorney.

BE IT FINALLY RESOLVED, that the Settlement Agreement will not become binding upon the City, and the City will incur no liability under it, until it has been executed by the Mayor, attested to by the Municipal Clerk, executed and attested to by the Contractor and delivered to the Contractor.